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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner
(Respondent-Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of S.S. KOTOR,
Respondent
(Libellant-Appellant below).

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The respondent's brief in opposition to the petition for a writ of certiorari, received on September 8, 1944 (seventy-seven days after the petition, supporting brief and notice of filing were served upon respondent's counsel), calls for a short reply.

POINT I

The jurisdiction of the Circuit Court of Appeals.

Respondent's argument in support of the decision of the Circuit Court of Appeals makes much of the doctrine that where an application for allowance of appeal is made within three months from the entry of the judgment, actual allow-

ance by the Court may come later. But that is not the situation here.

Respondent's brief overlooks the manifest fact that in the present case no application for allowance of an appeal was actually made within the statutory three months' period. This failure is established beyond doubt by (1) the recital in the District Judge's nunc pro tunc order of August 30, 1943 (R. 112, 113) that the Judge learned of appellant's intention to appeal, had not indicated any intention to disallow the same, "and undoubtedly would have allowed the appeal *if and when so requested*"*; (2) by respondent's actually making an application for allowance of appeal on August 14, 1943, twenty-five days after the three months' period had expired (R. 2, 32); (3) by petitioner's ultimate reliance upon a mere inquiry of the District Judge concerning the requisite amount of a cost bond (R. 118), which, subsequently obtained, was not submitted to the Judge for approval at all, and was not filed until July 21st, the day after the three months' period expired (R. 37, 119).

Respondent's argument that an appeal seasonably applied for cannot be frustrated by delay on the part of the Court, and the decisions supporting that doctrine, are accordingly beside the point.

On the other hand respondent's brief makes no effort to overcome the decision of *McCrone* v. *United States*, 307 U. S. 61, in which this Court, citing *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174, held that filing a notice of appeal and *having a bill of exceptions signed by the Court* within the three months' period was not a sufficient application for allowance of an appeal, saying:

> "The controlling statute required *application for allowance* of a civil appeal within three months after judgment from which appeal was sought" (p. 65).

* Emphasis supplied.

Respondent's brief also makes no effort to refute the established doctrine stated in *United States* v. *New National Coal and Mining Co.*, C. C. A. 7, 72 F. (2d) 168,* *Share* v. *United States*, C. C. A. 8, 50 F. (2d) 669, *Camden Iron Works* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846, and other decisions cited at page 22 of petitioner's brief herein, that the application required by the statute must be a request for an immediate and present action by the Court to allow the appeal. No such application was made by respondent, as the record clearly shows.

If these decisions are no longer the law, this Court, and this Court only, should so determine.

Respondent's citation at pages 10 and 11 of its brief, of the recent decision in *Miller* v. *Tietjen & Lang No. 2*, C. C. A. 3rd, 1944 A. M. C. 949, shows that the decision of the Circuit Court of Appeals in the present case has already become a precedent for the proposition that the mere filing of a notice of appeal in admiralty is a sufficient application for allowance thereof. Thus the decision of this Court in *Alaska Packers Association* v. *Pillsbury*, supra, is being whittled away by the lower courts to such an extent that it is becoming a dead letter, notwithstanding that this Court said, at page 177:

> " * * * The power of a court to make rules necessarily is confined to such as are consistent with controlling laws",

and Congress has not seen fit to relax the requirements of the statute, U. S. Code, Ti. 28, §230, in respect of appeals in admiralty.

The case is obviously one in which certiorari should be granted.

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*Inconsistent with, and apparently overruling, *United States* v. *Todar*, C. C. A. 7, 41 F. (2d) 146, cited at p. 7 of respondent's brief.

POINT II

The merits.

In order to support the decision of the Circuit Court of Appeals, respondent is forced to assert in its brief, page 12, that petitioner "furnished" to it the railroad weights (taken at interior points of origin), and to infer that this constituted a representation of the weight of the timbers when loaded on the vessel. This is factually wrong, and respondent does not and cannot point to anything in the record to substantiate its untenable position which also underlies the Circuit Court of Appeals' misunderstanding of this case.

The record shows without question that the railroad weights were ascertained by the railroads at inland points for the purpose of assessing railroad freight charges. The railroad freight bills containing these weights were admitted in evidence at the trial only by virtue of petitioner's admission that they were correct at the times and places described in such railroad freight bills, but not that they reflected the weights of the lumber when loaded on the vessel (R. 18). At most, the freight bills were only a representation by the *railroads to petitioner* that they correctly stated the weights of the timbers at the times and places of loading on the railroad cars at the beginning of the railroad transit, remote in time and distance from Jacksonville and before they were subjected to conditions which tended substantially to diminish their moisture and weight before they were loaded on the ship. The bills and their recital of weights later came into the hands of the ship's agent because the timbers were consigned in his care (Pl. Exs. 3 and 6). There is not a scintilla of evidence that petitioner ever "furnished" the railroad weights to respondent, or that petitioner in any way represented or indicated that they applied to the timbers when loaded on the vessel. On the contrary, the record shows without con-

tradiction that while the cars were awaiting the ship's arrival at Jacksonville, petitioner's representative told the ship's agent that the railroad weights did not show the actual weights on loading aboard the ship, and the ship's agent deliberately refused to ascertain the facts by the simple and inexpensive method of having the cars weighed (R. 95-97).

Overlooking these uncontradicted facts found by the District Judge (R. 19, 20, 22, 24, 25), the Circuit Court of Appeals held that petitioner failed to "entirely overthrow" the "positive rail weights obtained and furnished by the respondent" (petitioner herein) (R. 121). This fundamental misconception of the actual facts is reiterated in Point II of respondent's brief, and, together with the consequent departure from the cardinal principle that the burden of proving the facts relied upon as a breach of a shipper's warranty rests upon the carrier asserting such breach, requires review by this Court to correct the glaring injustice of the decision below.

Respondent's brief fails to mention or explain how the booking contract for "750,000 board feet pine timbers not exceeding 4 pounds per board foot at $70.00 per 1000 board feet" (R. 24, 39, 102) can be construed as a contract to ship at $35 per ton ocean freight, as the Circuit Court of Appeals erroneously considered (R. 115, 116); or on what principle of law a carrier may recover damages against a shipper for breach of a collateral warranty of the weight of the shipment without proving the quantum of overweight and the damages resulting therefrom. These questions are inherent in this case, and require review by this Court.

We do not believe that this case involves the Carriage of Goods by Sea Act, U. S. Code, Ti. 46, §1343. But respondent's reliance upon that Act, page 13 of its brief, if correct, furnishes additional need for interpretation by this Court on certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN TILNEY CARPENTER,
Counsel for Petitioner.

New York, September , 1944.